

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.330 OF 2007**

Gopinath Kashinath Mhatre
since deceased through his
Legal heirs

.. Appellant
(Orig.Plaintiff)

Versus

1) Tahsildar Alibag
2) Collector Raigad Alibag
3) Chief Secretary, Mantralaya
Mumbai

.. Respondents
(Orig.Defendants)

Ms. Gauri Godse, Advocate for the Appellant
Ms. G.P. Mulekar AGP for the Respondents

**CORAM : S.R. SATHE, J.
DATED : 14/08/2007**

ORAL JUDGEMENT :-

1. The Appellant, original Plaintiff in Regular Civil Suit No.170 of 1998 has preferred this appeal against the judgement and order passed by the Court of Additional District Judge, Raigad Alibag in Civil Appeal No.77 of 2002 whereby the appeal was allowed and the order passed by the Joint Civil Judge Junior Division Alibag directing Tahsildar Alibag and Collector, Alibag to re-grant the suit land in favour of Plaintiff and hand over the possession to them was set aside and the suit was remanded back for trial

after giving defendants opportunity to file Written Statement. For the sake convenience hereafter the parties shall be referred to as 'Plaintiff' and 'defendants'.

2. The brief facts giving rise to this appeal are as under :-

The suit lands described in details in para-1 of the plaint were initially owned by Plaintiff's grand father Aalu Bemtya Mhatre. After his death, lands were entered in the name of Plaintiff's father. In the year 1949-50, lands were covered by Arabian Sea. Accordingly, mutation entry No.868 was entered in the year 1954 and the suit lands were entered in the name of Government. According to Plaintiff, the Government did not pay any compensation. In the year 1975-76, Government constructed 'Bandhara' on the suit property and as a result of the same, since the year 1980-81 the suit lands became cultivable. It is Plaintiff's case that some unknown persons started taking paddy crop in the suit land. As the lands became cultivable on the 02/02/1996 son of Plaintiff submitted an application to the Collector Raigad to return suit lands to them.

However, there was no response from the defendant No.2 hence, Plaintiff issued notice under section 80 of CPC and asked Government that as per the provisions of the Maharashtra Land Revenue Code, alluvial land has become cultivable the same be re-granted to original Plaintiff. In spite of the same, defendants did not take any action hence, on 04/11/1998 Plaintiff filed suit for mandatory injunction directing the defendants Tahsildar and Collector to take the price of the suit land as per provisions of Maharashtra Land Revenue Code and re-grant the same hand over the possession to Plaintiff. The Plaintiff also prayed permanent injunction restraining the defendants from transferring the suit land to any other person.

3. Though, the defendants were served they did not file Written Statement. So, matter proceeded without Written Statement. However, subsequently, the defendants filed application and the Trial Court allowed the said application and permitted the defendants to file Written Statement subject to payment of costs at Rs.250/-. However, the defendants failed to deposit costs and so, the matter proceeded without

Written Statement.

4. The Plaintiff examined himself and one other witness. On the basis of their evidence the learned Joint CJSD, Alibag came to the conclusion that as per the provisions of Maharashtra Land Revenue Code the Plaintiff is entitled for re-grant of the suit land. He, therefore, directed the defendants to re-grant and give possession of the suit lands to Plaintiff. He, however, dismissed the Plaintiff's suit for permanent injunction.

5. Being aggrieved by the said order the defendants i.e. Tahsildar and Collector, Alibag and Chief Secretary Maharashtra State filed Civil Appeal No.77 of 2002 in the District Court Raigad. The learned District Government Pleader submitted that due to inadvertence costs remained to be deposited and the land being government land opportunity be given to the defendants to file their Written Statement and Trial Court be directed to re-hear matter and decide the same on merit. The learned advocate for the Respondent on the contrary submitted that sufficient opportunity was

given to the defendants to file Written Statement and the defendants failed to show any justifiable cause for not depositing costs and as such, the appeal be dismissed.

6. After hearing both the learned Advocates, learned Ad-hoc Additional District Judge, Raigad came to the conclusion that land being Government land and defendants being public servants, it is necessary to give one opportunity to the defendants so as to decide the matter on merits. He, therefore, set aside the order passed by the learned Trial Judge and remanded the matter as per the provisions of Order-41, Rule-23 (A) of Code of Civil Procedure and directed that the Civil suit should be decided on merits after allowing the defendants to file Written Statement.

7. The above mentioned order passed by the Ad-hoc District Judge is challenged in the present appeal.

8. In this appeal before me Ms.Godse, learned Advocate for the Appellant has urged only 3 points. Firstly, she submitted that there was no justifiable

reason for the additional district Judge, Raigad to remand the matter because sufficient opportunity was given to defendants and they failed to deposit the costs. Secondly, she canvassed before me that as per the provisions of Maharashtra Land Revenue Code, Plaintiffs are entitled for re-grant. Lastly, she submitted that as a result of the order passed by the Ad-hoc Additional District Judge now the defendants are even permitted to file Written Statement without costs and it has virtually amounted to granting extension of time to file Written Statement. She, therefore, submitted that the appeal be allowed and the order passed by the learned Additional District Judge be set aside and order passed by the Trial Court be restored. As against this, Smt. Mulekar learned AGP opposed the appeal.

9. It is not in dispute that the defendants were served with the suit summons but they failed to file Written Statement though opportunity was granted to them. Not only that but it does appear that they were even allowed to file Written Statement subsequently subject to payment cost of Rs.250/-. However,

unfortunately defendants even failed to deposit the said costs and as a result of the same, the matter proceeded without Written Statement. From the perusal of the record it appears that the defendants were in fact not present at the time of hearing and in a way the matter is decided exparte i.e. in their absence. One may argue that as the defendant had no case, they did not appear and so, it can not be said that the defendants did not get an opportunity to defend or to put forward their case. If really the defendants had no intention to oppose the suit then certainly they would not have sought permission to file Written Statement. However, unfortunately the defendants failed to deposit the costs as directed by the Trial Court and as such the matter proceeded without Written Statement. It is usual experience that in many Government matters, the matters are not properly attended by the concerned officers and as a result of the same, some times the Government is required to suffer and indirectly public is put to loss. Some times, it may also happen that the concerned officer may join hands with the Plaintiff and as a result of the same, the matter may proceed exparte or without Written Statement. So, while considering the

point as to whether the facts and circumstances of the case require remand of the matter one has to take into consideration all these factors.

10. It is true that the powers under Order-41, Rule-23 or Rule-23(A) of CPC have to be used sparingly and it should be exercised only if it is absolutely necessary. Directing the party who has succeeded in the Trial Court to lead evidence once again is bound to cause some inconvenience and additional expenditure to it. It may also happen that the defendants might have taken a chance to remain absent or not to file Written Statement with a view to prolong or delay the proceedings.

11. Bearing in mind the above mentioned principles if we see the facts and circumstances of the present case it appears that in the instant case even according to Plaintiff suit lands were taken away by Arabian Sea (Darya Gerik) in the year 1949-50. So, admittedly, since then they are not in possession of the said lands. On the contrary, mutation entry No.868 was also effected and the suit lands were shown in the name of

Government. It is Plaintiff's case that as a result of the Government constructing 'Bandhara' the said lands became cultivable in the year 1980-81 and as such as per the provisions of Maharashtra Land Revenue Code, Plaintiffs were entitled for re-grant of the said lands. It is true that Plaintiff adduced evidence to show that initially the said lands were owned by his grandfather but there is nothing on record to indicate that now the said lands have become cultivable and liable for re-grant. So, under such circumstances, for deciding the matter justly and correctly it is necessary to give opportunity to defendants to file their Written Statement as admittedly, at the relevant time the lands are standing in the name of Government. So, considering all these aspects, I am of the view that re-trial of the matter is necessary failing which substantial mis-carriage of justice is likely to result. So, under the circumstances, I do not think that the order passed by the learned Ad-hoc Additional District Judge remanding matter is ill-legal, incorrect or improper. However, while doing so, he ought to have taken care to see that in this entire process inconvenience has been caused to the Plaintiffs and for

that he ought to have been adequately compensated.

Hence, I pass the following order :-

O R D E R

1. Appeal is partly allowed.
2. Order passed by the Ad-hoc Additional District Judge, Raigad remanding Regular Civil Suit No.170 of 1998 to the Trial Court for fresh trial is confirmed. However, it is directed that the Trial Court shall allow the defendants to file Written Statement on payment of costs of Rs.2000/- to the Plaintiffs. Costs to be deposited by the original defendants in the Trial Court within one month from today and defendants to file their Written Statement on or before 17/09/2007. The Trial Court to decide the suit according to law without being influenced by the observations made in this order before 30/11/2007.
3. Under the circumstances, parties to bear their own costs of the present appeal.

(S.R.SATHE, J.)